## SEPARATE OPINION OF JUDGE ABRAHAM

*[Translation]*

*Agreement with the operative clause of the Judgment — Disagreement with reasoning by means of which the Judgment dismisses the argument that Serbia does not have standing to take part in the proceedings — Question of the scope of Article 35 of the Statute — Two possible interpretations: conditions applicable to both Parties, or only to the Applicant — Better founded and more numerous arguments in favour of the second interpretation — Textual arguments — Analysis of the* travaux préparatoires *— Analysis of the judicial practice and prior jurisprudence of the Court — Rationale and purpose of the text — Principle of the equality of the States parties to a treaty containing a compromissory clause — Conclusion: invalidity of arguments in the Judgment seeking to demonstrate that the Respondent had access to the Court for the purpose of the proceedings, on the basis of Article 35, paragraph 1, of the Statute — Date when fulfilment of conditions for the Court's jurisdiction must be assessed — Principle: conditions which must be fulfilled on the date when proceedings are instituted — Exception arising from the decision in the* Mavrommatis *case — Incorrect application by the Court of that decision in the case — Need to rule on the applicability on the present date of Article IX of the Genocide Convention in relations between the Parties — Reservation accompanying Serbia's alleged "accession" to the Convention in 2001 devoid of legal effect.*

1. To convince the Court to declare that it lacked jurisdiction to hear Croatia's Application, Serbia relied on two arguments, each of which would, in its opinion, be sufficient to justify a ruling on a complete lack of jurisdiction. First, it contended, the Court was not "open" to Croatia within the meaning of Article 35, paragraph 1, of the Statute on the date when the Application was filed (2 July 1999), thus no proceedings could be brought before it since it could not appear before the Court even as a respondent. Second, it was not a party, on that date, to the Genocide Convention, and was not thus bound by the compromissory clause in its Article IX relied upon by Croatia as the basis for jurisdiction — a clause by which, moreover, it has never been bound, having been careful on its accession to the Convention in 2001 to make a reservation to exclude it.

2. The Court has dismissed all those arguments and found that it has jurisdiction to hear the case on the basis of the compromissory clause invoked by the Applicant.

I wholly approve of the operative clause of the Judgment. However, I only approve the reasoning in part.

While, overall, I agree with the reasons for which the Court has dismissed the second limb of the objection to jurisdiction — the one concerning the fact that Serbia was allegedly not a party to the Genocide Convention, including its Article IX, in 1999 — on the other hand, the

reasons given in the Judgment to justify the dismissal of the first part of the objection do not satisfy me at all, since, in my opinion, they are not supported by a correct analysis of the applicable law.

3. The Court's task was to answer the objection, portrayed by the Respondent as absolute, deriving from the fact that, not being a party to the Statute of the Court in 1999 — and not becoming one until 1 November 2000 — that Serbia did not have standing to validly appear before the Court, the latter not being "open" to it within the meaning of Article 35 of the Statute.

Such an objection was not unfamiliar ground for the Court. No one has forgotten that in 2004 it was precisely because Serbia and Montenegro was not a Member of the United Nations, nor therefore a party to the Statute of the Court, until 1 November 2000, that eight Applications filed by that country in 1999 against eight NATO Member States were dismissed due to the resulting lack of jurisdiction (see the Judgments delivered on 15 December 2004 in the cases concerning *Legality of Use of Force* (Serbia and Montenegro *v.* various NATO member States), *I.C.J. Reports 2004 (I, II, III)*, pp. 279-1450).

4. In the present proceedings, however, Serbia has not come before the Court as an Applicant, as in the aforementioned cases. It appears as a Respondent and itself pleads its lack of standing as a party to the Statute of the Court in order to avoid its jurisdiction. From the fact that the Court was not "open" to it under Article 35 of the Statute it seeks here to draw the, for it, favourable conclusion — that it would be safe from the compulsory jurisdiction of the Court — whereas in 2004 an unfavourable conclusion was drawn against it: it was not allowed to use the Court to set out its claims.

Nevertheless, the Judgment does not appear to take account of this difference in situation. The Court examines the issue of whether the Respondent fulfils the conditions to which Article 35 of the Statute makes "access" to the Court subject, as if those conditions were uniformly applicable to an applicant and to a respondent. At the end of its reasoning, to which I will return below, as it does not seem to be entirely rigorous, the Court answers in the affirmative, without however contradicting its 2004 Judgments: Serbia does indeed fulfil the conditions for access to the Court, for the purposes of the present proceedings, because it was accepted as a Member of the United Nations on 1 November 2000 and became a party to the Statute on that date.

5. I consider that the long and complex arguments which the Court devotes to the question of Serbia's "access to the Court", in the light of Article 35 of the Statute (in paragraphs 57 to 92 of the Judgment), were in fact pointless. The reason is that, in my opinion, *the conditions in Article 35 of the Statute do not apply to the respondent in proceedings, but only to the party which brings the case to the Court*. It is true that Croatia itself, which might nevertheless have derived benefit from it, did not argue in favour of such an interpretation, which was hardly likely to encourage the Court to adopt such an approach. But, as it was a matter

of interpreting its Statute, it was for the Court to rule ex officio, without being bound by the arguments of the parties in a given case. In addition, the Court had explicitly reserved this question in its Judgment on the merits in the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)* case (*I.C.J. Reports 2007 (I)*, p. 102, para. 141), rightly indicating (paragraph 141 of the Judgment) that "[t]his matter, being one of interpretation of the Statute, would be one for the Court to determine".

I will now set out the reasons why I at least have come to the above conclusion regarding the interpretation of Article 35 of the Statute. To do so I must begin with the relevant provisions, whose intrinsic logic I shall endeavour to reveal.

6. Taking the expression in the broad sense, the capacity (or standing) to take part in proceedings before the Court is subject to conditions which are defined in Articles 34 and 35 of the Statute.

Article 34 in principle reserves the right to appear before the Court to States, while in certain conditions authorizing public international organizations to submit observations in certain cases.

Article 35 further reserves access to the Court to States which:

— either are parties to the Statute (which is the case of all United Nations Member States and non-Member States which have decided to become parties to it under the conditions laid down in Article 93, paragraph 2, of the Charter) — which is what is stated in Article 35, paragraph 1;
— or, though not parties to the Statute, have complied to the conditions laid down in a Security Council resolution, "subject to the special provisions contained in treaties in force" — which is what is stated in paragraph 2. The resolution in question (S/RES/9 (1946) of 15 October 1946) provides that the Court shall be open to any State which is not a party to the Statute having deposited a declaration by which it undertakes to accept the jurisdiction of the Court and the authority of its decisions, either in general or in a particular case.

7. It is certain that the condition laid down by Article 34 for a legal entity to be able to take part in proceedings before the Court (namely that that entity must be a State under international law) applies equally to the applicant and the respondent (and to both if the case has been brought before the Court jointly by a special agreement).

8. The scope of application of Article 35, however, is debatable. While it is clearly apparent from the wording itself that paragraph 3 of Article 35 — which gives the Court the power to fix the amount to be contributed to the cost of proceedings by a State which is not a Member of the United Nations — applies to any State in the situations so defined, be it an applicant or a respondent, a simple reading of paragraphs 1 and 2 of

that same Article 35 does not make it easy to reach such a certain conclusion.

9. In this connection, two interpretations may be defended (and have moreover been so defended both in scholarly works and in the practice of the Court prior to the present Judgment).

According to one interpretation, paragraphs 1 and 2 have the same scope of application as paragraph 3, the result being that the conditions established by these two paragraphs would apply equally to the applicant State and the respondent State, the Court being unable to exercise its jurisdiction unless both of them, in one way or another, fulfil those conditions. Thus, for example, even if the applicant State is a Member of the United Nations, the Court would also not be able to exercise its jurisdiction if the respondent State were not a party to the Statute and had also not deposited the declaration of acceptance provided for by the Security Council resolution of 15 October 1946 (unless between the two States concerned, there was a "treaty in force" within the meaning of Article 35, paragraph 2, that is to say a treaty which was already in force on the date when the Statute came into force, as the Court pointed out in its Judgments of 15 December 2004 in the cases concerning *Legality of Use of Force*).

But a second interpretation is possible whereby, in order to ensure that it is in a position to exercise its jurisdiction, the Court merely has to verify that the applicant State, and it alone, fulfils the conditions — the alternative ones — mentioned in Article 35, paragraphs 1 and 2.

10. It should be noted here and now that if, as I believe it should, the second interpretation were to be upheld, that would clearly not mean that the Court would be justified in exercising its jurisdiction with respect to a respondent State which had not, one way or another, consented to its jurisdiction. Irrespective of the interpretation of Article 35 adopted, consent to the jurisdiction of the Court must be verified, both with respect to the applicant State and to the respondent State. The consequence of the second interpretation is only that, where the respondent State is concerned, it would be sufficient to verify that it is bound vis-à-vis the applicant State by a treaty containing a clause attributing jurisdiction to the Court, which clause would establish its consent to jurisdiction (or any other form of jurisdiction), without there being any need also to wonder whether it is a Member of the United Nations or party to the Statute of the Court or, failing that, whether it has made the declaration laid down by the 1946 resolution — the latter conditions only being relevant, and only requiring verification, with respect to the applicant State.

11. It is immediately clear that the choice between the above two interpretations is not purely academic. It can have decisive consequences regarding the possibility for the Court to exercise its jurisdiction in the following situation: the two States in dispute are bound by a treaty containing a compromissory clause attributing jurisdiction to the Court to settle such a dispute, but it is not a "treaty in force" within the meaning

of paragraph 2, because it post-dates the Statute; seisin of the Court is made by way of a unilateral application; the applicant State is a Member of the United Nations (or, failing that, it is party to the Statute of the Court, or has filed the declaration laid down by the 1946 resolution); the respondent State, by contrast, is not a Member of the United Nations, is not a party to the Statute of the Court, and has not signed — and does not wish to sign — the above declaration.

In that case, the choice of the first interpretation of Article 35 prevents the Court from exercising its jurisdiction, notwithstanding the compromissory clause binding the two States. The choice of the second interpretation on the other hand enables the Court to exercise its jurisdiction.

12. Such a situation is unlikely to arise often before the Court.

It does, however, happen to correspond to the *Bosnia and Herzegovina* v. *Serbia and Montenegro* and the *Croatia* v. *Serbia* cases, at least providing Serbia (then the FRY) on the one hand, and the two applicant States on the other, are regarded as being bound, on the dates when the Applications were filed, by the Genocide Convention and its Article IX, and providing we confine ourselves, where the conditions of Article 35 are concerned, to the situation prevailing on those dates, when the Respondent did not fulfil any of the said conditions, according to what the Court ruled in its 2004 Judgments cited above.

13. There is no doubt that there are sound arguments in favour of each of the two above interpretations. On reflection, even though the prevailing academic view appears to indicate the contrary if anything, I have come to the conclusion that the most numerous and sounder arguments weigh in favour of the interpretation whereby the conditions mentioned in Article 35, paragraphs 1 and 2, are required of the applicant State alone when a unilateral application is brought before the Court on the basis of a compromissory clause applicable to relations between the applicant and the respondent.

I will endeavour to summarize below the reasons which lead me to this conclusion, and which are based upon:

*(a)* the actual text of the Statute;
*(b)* the *travaux préparatoires*;
*(c)* practice and jurisprudence; and lastly
*(d)* the rationale of the provisions being interpreted.

## (A) Textual Arguments

14. Paragraph 1 of Article 35 contains the phrase: "The Court shall be open." The same phrase is repeated in paragraph 2: "The conditions under which the Court shall be open to other States shall . . . be laid down by . . ."

In itself, the expression which has passed into current legal usage as "access to the Court", which is its exact equivalent from the opposite per-

spective, that of the State, quite clearly suggests that what is at issue here is defining the conditions under which a party to a dispute can bring it before the Court and address it in order to uphold what it considers to be its rights.

The "ordinary meaning" of the terms used, to borrow the expression in Article 31, paragraph 1, of the Vienna Convention, does not at first sight point towards a "symmetrical" interpretation of the text, according to which the conditions laid down would also have to be fulfilled by the respondent. Yet the respondent is not seeking access to the Court, since in any number of cases, it seeks, on the contrary, to evade its jurisdiction by, rightly or wrongly, challenging it. As it is not the one trying to push open the door of the Court, it is hard to see why conditions of entrance should be imposed on it (or on it as well).

In the admittedly to some extent specific field of international human rights law, the "right of access to a court" (a national one) defined as a fundamental component of the right to a "fair trial", guaranteed by Article 14 of the International Covenant on Civil and Political Rights and Article 6 of the European Convention on Human Rights, has always been understood as a person's right to seise a court in order to put his or her claims to it, thus a right as applicant and not as respondent. Naturally, that does not mean that, once the proceedings have commenced, the requirements of a "fair trial" (impartiality and independence of the Court, etc.) will not apply just as much for the applicant as for the respondent , and the two parties must be treated equally in the proceedings.

This is the "ordinary meaning" of the words.

15. This first impression is supported by a comparison of the terms contained in paragraphs 1 and 2 of Article 35 with those in Article 34 and Article 35, paragraph 3.

The latter two provisions show that when the authors of the Statute wished to establish a rule applicable to both parties to proceedings, they carefully indicated it by unequivocal wording. Hence, Article 34 provides that "[o]nly States may be parties in cases before the Court" and Article 35, paragraph 3, refers to a State which "is a party to a case". In contrast, the terminology used in paragraphs 1 and 2 of Article 35 ("The Court shall be open") does indeed seem to suggest that it is referring to something else: the party, and only that party, which takes the initiative of bringing a case before the Court — both parties in the event of joint seisin; but only one of them in the event of a unilateral application.

### (B) Analysis of the *Travaux Préparatoires*

16. Reference should be made, as the Court did in its Judgments of 15 December 2004 (see, for example, paragraphs 103 to 108 of the Judgment in the *Legality of Use of Force (Serbia and Montenegro* v. *Belgium)* case (*Preliminary Objections, Judgment, I.C.J. Reports 2004 (I)*,

pp. 319-321), to the *travaux préparatoires* of Article 35 of the Statute of the Permanent Court of International Justice, which contained provisions in substance identical to those in Article 35 of the present Statute.

17. There is, so it seems, only one indication concerning the scope of the terms "The Court shall be open . . ."; but it is a particularly clear one.

18. The first draft of the provision which was to become Article 35 (then number 32) was the fruit of the work of the Advisory Committee of Jurists in 1920. That provision contained a first subparagraph drafted as follows: "The Court shall be open of right to the States mentioned in the Annex to the Covenant, and to such others as shall subsequently enter the League of Nations."

When the preliminary draft was considered by the sub-committee of the Third Committee of the first Assembly of the League of Nations, one of the members of the sub-committee, Sir Cecil Hurst, pointed out that "under the Treaties of Peace the Central Powers would often be Parties before the Court" and that "[t]he text of the draft does not take sufficient account of this fact". In other words, he feared that the requirement, for access to the Court by a State that had taken part in the creation of the League of Nations or subsequently become a Member of it, might prevent disputes implicating the Central Powers, who did not meet those requirements, from being submitted to the Court.

The answer given by the Chairman of the subcommittee was perfectly clear: "the Article applie[s] only to the plaintiff Parties" (see League of Nations, Permanent Court of International Justice, *Documents concerning the action taken by the Council of the League of Nations under Article 14 of the Covenant and the adoption by the Assembly of the Statute of the Permanent Court*, p. 141).

In the rest of the *travaux préparatoires* of the Statute of the Permanent Court, there does not appear to be any other comment on this question to invalidate or contradict the one just mentioned.

As for the *travaux préparatoires* of the Statute of the International Court of Justice, they would seem to contain no further comment.

### (C) Analysis of Judicial Practice and Jurisprudence

19. The practice of the Permanent Court appears to have been a little unclear.

In the first case in which the question of the interpretation of Article 35 arose, the Court appears, in its practice, to have abided by the interpretation according to which the conditions of access to the Court apply to the Applicant alone.

If we are to give credence to the generally well informed commentary on the Statute and the Rules of the Permanent Court of International Justice published in Berlin in 1934 under the aegis of the Institute for Public International Law:

"In the *S.S. 'Wimbledon'* case, brought before the Court under Article 386 of the Treaty of Versailles, Germany, which at that point had yet to become a Member of the League, was the Respondent. A declaration was not considered as necessary, on the one hand, in light of the reservation contained in Article 35, paragraph 2, of the Statute which concerns in particular — as is apparent from the drafting history of the article — certain provisions of the Peace Treaties, *and on the other hand, in those proceedings Germany was the Respondent and the article — as also seems apparent from its drafting history — only concerns the applicant parties*." *[Translation by the Registry.]* (B. Schenk von Stauffenberg, *Statut et Règlement de la Cour permanente de justice internationale: éléments d'interprétation*, Carl Heymanns Verlag, Berlin, 1934, p. 234; emphasis added.)

20. A few years later the question arose again when the Rules of Court were revised in 1926. It was then decided to add a provision making it an obligation for a State not a Member of the League of Nations to deposit the declaration provided for by the resolution of the League Council of 17 May 1922 with the Registry of the Court. During the meeting on 25 June 1926, the Registrar recalled in that connection "the decision taken by the Court in the *Wimbledon* case. At that time, it had been decided that the obligation in question could only be imposed on the applicant Party, and not on the respondent." (Publications of the Permanent Court of International Justice, *Series D, Acts and Documents concerning the Organization of the Court, Addendum to No. 2, Revision of the Rules of Court*, p. 75.)

21. However, at the meeting on 21 July 1926, during which that provision of the revised Rules was considered, the President said that:

"It [is] quite natural that States that wish . . . to profit by the institution established by the League of Nations . . . have to accept the conditions fixed by the Covenant, and that States which, for one reason or another, [have] not yet done so should accept them by means of this declaration, whether they appear . . . before the Court as Applicant or Respondent." (*Ibid.*, p. 106.)

22. Eventually, the Court adopted a neutral phrase, worded as follows (Art. 35):

*"(2) The declaration provided for in the Resolution of the Council of the League of Nations of May 17, 1922 (Annex), shall, when it is required under Article 35 of the Statute, be deposited with the Registry not later than the time fixed for the deposit of the first document of the written procedure."* (*Op. cit.*, von Stauffenberg, p. 235; emphasis in original.)

As was observed in the aforementioned commentary on the Statute and the Rules of the Permanent Court:

"The text adopted left the question of the circumstances in which the declaration is necessary entirely unresolved, and preserved the freedom of the Court to rule in each individual case on the necessity of the declaration;

. . . . . .

*The provision adopted by the Court did not settle the matter of whether the obligation to make a declaration also extended to States appearing before the Court as respondents either*." (*Op. cit.*, von Stauffenberg, pp. 235-236; emphasis added.)

23. The practice of the International Court of Justice in the matter at hand provides little in the way of enlightenment. We appear to find the same uncertainties as before.

In support of one of the two interpretations (the one I referred to as "symmetrical" above) the *Corfu Channel* case should be mentioned. In its Order of 31 July 1947 to fix the time-limits for the submission of the first two written pleadings, the President held that "the . . . note of the Albanian Government may be regarded as constituting the document mentioned in Article 36 of the Rules of Court" (*I.C.J. Reports 1947-1948*, p. 5). Article 36 of the Rules of Court dealt precisely with the case of States which were not parties to the Statute, but which had access to the Court under Security Council resolution 9 of 1946, which for that purpose, as mentioned above, required the filing of a declaration. In those proceedings, Albania was the Respondent: we may deduce from this that, in the view of the President, both the respondent and the applicant were subject to the conditions of "access to the Court" laid down by Article 35 of the Statute.

24. But conversely, it must be noted that the Rules of Court, having initially retained a neutral phrase on the point concerned — that is, one which did not permit a final decision as between the two possible interpretations of Article 35 of the Statute — following on in this respect from the Rules of the former Permanent Court, moved away from that position as of the Revised Rules of 1978. Indeed, in Article 36 and Article 39 respectively, the 1946 and the 1972 Rules of Court contained an (identical) provision, the actual wording of which did not indicate whether the declaration provided for by Security Council resolution 9 of 1946 was required of the applicant State alone or of each of the two States parties to the proceedings, when either, or even both, were not parties to the Statute. On the other hand, the Rules of Court in force since 1978 contain an Article 41 worded as follows:

"*The institution of proceedings* by a State which is not a party to the Statute but which, under Article 35, paragraph 2, thereof, has accepted the jurisdiction of the Court by a declaration made in accordance with any resolution adopted by the Security Council under that Article, shall be accompanied by a deposit of the declaration in question, unless the latter has previously been deposited with the Registrar . . ." (Emphasis added.)

As was noted by Shabtai Rosenne, who appears very hesitant on the point concerned, "The Rules contain no parallel provision regarding the filing of a declaration by a respondent which is not a party to the Statute." (*The Law and Practice of the International Court, 1920-2005*, Fourth Edition, Vol. II, *Jurisdiction*, p. 619.)

The silence of the Rules of Court regarding a respondent State which is not party to the Statute, when an express provision obliges an applicant State in such a situation to prove that it meets the conditions of "access to the Court" laid down in Article 35, paragraph 2, constitutes a fairly clear indication in favour of the interpretation restricting the scope of that Article to the applicant.

25. The foregoing considerations concern what I have termed the "judicial practice" of the former and the existing Courts: we can see that the practice has varied.

It is another matter to ascertain whether the point under discussion has been settled by the *jurisprudence* as such, that is to say by an analysis of the judicial decisions rendered by the Court itself prior to the present Judgment. It would not appear so.

26. It must be said that the Order of 8 April 1993 on the Request for provisional measures in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia)* was fairly clearly, albeit implicitly, inspired by the "symmetrical" interpretation of Article 35. After expressing its doubts on whether Yugoslavia was then a Member of the United Nations and, as such, a party to the Statute of the Court (*I.C.J. Reports 1993*, p. 14, para. 18), and citing Article 35, paragraph 2, of the Statute, the Court went on to assert that

> "the Court therefore considers that proceedings may validly be instituted by a State against a State which is a party to such a special provision in a treaty in force, but is not a party to the Statute, and independently of the conditions laid down by the Security Council in its resolution 9 of 1946" (*ibid.*, para. 19),

before concluding that Article IX of the Genocide Convention could be regarded prima facie as such a provision and thus provide sufficient basis for jurisdiction in that case *(ibid.)*. The reasoning thus deployed presupposes at least tacitly that the conditions of "access to the Court" in Article 35 are equally applicable to the respondent: if not, since in that case it was only the Respondent's standing as party to the Statute that was in doubt, not the Applicant's, the Court would not have needed to fall back on the notion of "treaty in force" within the meaning of paragraph 2 and find that such a treaty was binding on both Parties to the proceedings.

But the Order of 1993 certainly did not aim to settle the issue definitively, its conclusions were only prima facie and the passage cited above was, moreover, partly contradicted by the Court, following more detailed consideration of the term "treaties in force" in its Judgments

of 15 December 2004 on the cases concerning *Legality of Use of Force*.

27. The Judgment of 11 July 1996 on the preliminary objections in the same case shed no new light on the point under discussion. As the FRY argued that it lacked standing as a party to the Statute in order to challenge the jurisdiction of the Court, the Court did not have to consider the question, nor therefore the prior question of whether the conditions of access to the Court in Article 35 are also applicable to a respondent State. And while it must be borne in mind that, by declaring its jurisdiction to hear the dispute on the basis of Article IX of the Genocide Convention, the Court must be assumed, by deduction, to have considered that all the conditions of "access to the Court" mentioned in Articles 34 and 35 of the Statute had been met, it is, however, impossible to logically construe that it did so on the basis of either of the two possible interpretations of the scope of application of Article 35.

28. Finally, the Judgments of 15 December 2004 do not provide any more decisive indications: true, the Court found that it lacked jurisdiction to hear the Applications by Serbia and Montenegro on the ground that that State did not meet the conditions of Article 35, but it was the applicant State. None of the wording used by the Court in its Judgments in those cases clearly indicates either that the conditions of Article 35 applied to the applicant State alone, and that the Court only considered them in those cases because it was the Applicant who allegedly did not fulfil them, or, on the contrary, that those conditions applied to the Respondents as much as to the Applicant, for as Members of the United Nations, there is no doubt that the former fulfilled them.

In short, the Court had no need to settle the question of whether a respondent must fulfil the "conditions of access" and it did not do so.

As I said above, it even expressly reserved the question in its 2007 Judgment delivered in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*.

### (D) Rationale and Purpose of the Text

29. More than the above arguments, it is the arguments derived from the rationale of the text to be interpreted and its ultimate purpose, or what must be supposed to be its ultimate objective, which seem to me to point in favour of one of the two interpretations.

30. The actual situation in which the difficulty of interpretation we are seeking to resolve is likely to arise should not be forgotten.

That situation presupposes a combination of two factors.

First, a dispute must arise between two States, between which a compromissory clause assigning jurisdiction to the Court is in force: if this is not so, and because, moreover, at least one of those States is not, let us

suppose, a party to the Statute, the Court cannot have jurisdiction and no other question arises.

Second, at least one of the two States concerned must not fulfil the conditions of "access to the Court" in Article 35 of the Statute: that State is not a party to the Statute, and it has not signed the declaration required by Security Council resolution 9 of 15 October 1946. Indeed, it is obvious that if the two States in dispute satisfy the conditions of access to the Court, either under paragraph 1 or under paragraph 2 of Article 35, the question of whether these conditions apply only to the applicant State or to both States parties to the case is irrelevant, and, in that event, the case could equally well be brought before the Court jointly by way of a special agreement or by a unilateral application by either one of the two States concerned.

31. Let us suppose then that the two above conditions are both met: it is then that the question of choosing one of the two possible interpretations of Article 35 regarding its scope of application arises. The advantages and disadvantages of each of them must be considered, in particular with regard to their consequences.

32. The principal objection which comes to mind when considering the interpretation whereby the conditions of access apply only to the applicant and do not have to be fulfilled by the respondent, without this meaning that the Court is prevented from exercising its jurisdiction, is that of the dissymmetry, imbalance, or even inequality it appears to create between the two opposing States.

33. One can indeed recall, in response to this objection, that whatever the solution chosen, once proceedings have begun, in procedural terms, the two parties will and must be treated with strict equality by the Court. While this is true, it does not wholly answer the objection.

34. The consequence of an "asymmetrical" interpretation of Article 35 appears to be that, for two States bound by a compromissory clause, where one of them fulfils the conditions of access but the other not, the former could take the initiative to bring the latter before the Court (since it has standing to do so), while the converse will not apply: is that not a breach of the fundamental principles of the equality but also as the reciprocity of the rights of States, principles which must be applied as much in bringing a case before the Court as in the course of the proceedings?

35. However, on further reflection, that objection is not convincing at all, since the inequality which it exposes is merely apparent. Indeed, there is nothing to stop a State which is a party to a treaty containing a compromissory clause and which seeks to apply it in order to resolve a given dispute from positioning itself so as to have access to the Court by fulfilling the conditions laid down by Article 35, paragraph 2, and the Security Council resolution to which that paragraph refers.

To do so, that State, which we are assuming is not a party to the Stat-

ute, merely has to file with the Registry of the Court a declaration by which it accepts the jurisdiction of the Court and undertakes to comply with its decision (resolution 9, para. 1). Such a declaration may be signed for the purposes of resolving a particular dispute which has already arisen (*ibid.*, para. 2). It can be submitted at any time and takes immediate effect.

36. Thus, in the "asymmetrical" interpretation of Article 35, there is no real inequality between the two States bound by a compromissory clause: the one which does not already fulfil the conditions of "access to the Court" but which seeks to bring a dispute before it can — and it alone can decide this — enable itself to do so.

37. Let us now consider the disadvantages which, conversely, the "symmetrical" interpretation of Article 35 would entail, the one which prevents the Court from exercising its jurisdiction solely because the respondent does not fulfil the conditions of access to the Court.

38. Two States are bound by a compromissory clause; let us suppose that one of them fulfils the conditions of access to the Court (because, for example, it is a Member of the United Nations, and therefore a party to the Statute of the Court), while the other does not.

The second State could, at any point, implement the compromissory clause against the first by, for the purposes of the case, filing the declaration laid down by resolution 9 of 1946. But the first State could not solely of its own volition bring the second before the Court: all the respondent would need to do, if it did not want such proceedings, would be to plead that it did not fulfil the conditions of access to the Court in order to put itself beyond its compulsory jurisdiction, notwithstanding the compromissory clause.

39. Two highly prejudicial consequences would flow from this.

40. First, what we have termed the "symmetrical" interpretation of Article 35, which a large section of scholarly opinion (and possibly the Court itself) appears to favour, owing to its symmetrical nature, *actually creates real inequality between the States*.

It is symmetrical in appearance only: in reality it leads (or can lead) to dissymmetrical consequences.

41. Second, it enables a State which is not a party to the Statute, but which is nonetheless bound by a treaty containing a compromissory clause attributing jurisdiction to the Court in the event of a dispute (there is no contradiction or legal impossibility in such a situation), not to comply with that compromissory clause every time that it chooses not to, by refraining from satisfying the conditions of access to the Court. In other words, this interpretation of Article 35 *enables a State to comply or not to comply, as it sees fit, with a treaty clause, compliance with which nonetheless constitutes an international legal obligation*.

Can we reasonably suppose that those who drafted Article 35 of the Statute sought to achieve such a result or simply to make it possible?

Can we accept an interpretation of a treaty provision (Article 35 of the Statute) which ultimately means stripping other treaty provisions (the compromissory clauses of treaties to which States not parties to the Statute of the Court are parties) of any actual meaning?

In short, can we accept an interpretation of the law which enables a State not to honour a legal obligation?

That would, as I see it, be seriously illogical. Yet it is what is suggested, reading between the lines, by the Judgment which the Court has just delivered.

42. It might be objected that compliance with a compromissory clause by States which are parties to the treaty in which it is contained is one thing, while the application by the Court of the conditions of jurisdiction arising from its Statute is another; and that, consequently, regrettable though the conduct of a respondent which does not accept the jurisdiction of the Court though bound vis-à-vis the applicant by a compromissory clause may be, nonetheless that does not authorize the Court to uphold its jurisdiction if the respondent is not a party to the Statute and has not signed the declaration provided for by resolution 9 of 1946 and that the said Statute makes the jurisdiction of the Court subject to the fulfilment of one or other of those conditions.

I would be willing to accept such an argument, despite its highly abstract and formalistic character and the regrettable nature of the consequences stemming from it, if Article 35 of the Statute was sufficiently clear and categorical as to leave no reasonable room for any interpretation other than the one which requires *both* parties to fulfil the conditions laid down in it for the Court to be able to exercise its jurisdiction. But, precisely, I believe I have shown above that this is certainly not the case: both the actual text and the *travaux préparatoires* tend, if anything, to support the opposite interpretation.

43. Let us pursue this line of reasoning. If we accept, for the time being, the opposite interpretation of Article 35 to the one I propose, it follows that the conduct of the respondent which is not a party to the Statute of the Court and which refrains from filing the declaration laid down by resolution 9 of 1946 (which it is *always* free to do), when it is bound by a compromissory clause attributing jurisdiction to the Court, constitutes a violation, by that respondent, of the compromissory clause, as it seeks to foil the jurisdiction of the Court which the respondent nevertheless accepted as an obligation on becoming a party to the treaty. Faced with such a situation, should the Court, by declaring that it lacks jurisdiction, agree to allow this unlawful conduct to produce the very outcome which the perpetrator of that conduct (our hypothetical, or perhaps not so hypothetical, respondent) seeks to attain? I venture to suggest that would be allowing a little too much rein to jurists' natural propensity for abstract reasoning, were that to lead to consequences at variance with the elementary requirements of the law and common sense combined.

44. I thus come to the following conclusions:

The fundamental rule laid down by Article 34 of the Statute obviously applies to both the applicant and the respondent: in order to appear before the Court as a party to proceedings in any capacity whatever, a party must be a State.

However, the "conditions of access" defined by Article 35, paragraphs 1 and 2, apply to:

— both parties to the dispute, if the case is brought before the Court jointly by them;
— to the respondent alone, if the case is brought before the Court by a unilateral application.

* * *

45. In the present Judgment, the Court could have chosen to follow the path I have outlined. Two, in my view, positive consequences would have followed. In the first place, the Court would not have needed to enter into the particularly complex question of whether and for what reasons the fulfilment of the conditions of "access to the Court" (which, as the Judgment notes, the Respondent did not meet on the date when the Application was filed) could be evaluated in the present case by viewing them from the perspective of a later date, when, as a general rule, jurisprudence requires that the conditions governing the jurisdiction of the Court must be fulfilled at the time when proceedings are initiated. Second, the solution we suggest would have made it possible to demonstrate that, contrary to the thoughts and writings of numerous commentators, there was no contradiction between the position adopted by the Court in its 1996 Judgment on the preliminary objections in the *Bosnia and Herzegovina* v. *Serbia and Montenegro* (then known as the FRY) case and the position adopted in the 2004 Judgments, also on preliminary objections, in the cases between Serbia and Montenegro and various NATO Member States. If the Court had found that it had jurisdiction in the first case and not in the second raft of cases, it could not be criticized for contradicting itself, bearing in mind that the condition which was not met by Serbia, the applicant State in the cases examined in 2004, was simply not applicable to that State, in its capacity as the Respondent, in the case on which the Court ruled in 1996. On the contrary, the reasoning adopted by the Court in the present Judgment inevitably reveals the erroneousness of the Judgment delivered in 1996 on its jurisdiction in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia, Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, p. 595). Indeed if the condition of "access to the Court' within the meaning of Article 35 of the Statute is as applicable to the respondent as it is to the applicant, which is what the present Judgment quite clearly suggests, without expressly saying so, the Court should have ruled that it lacked jurisdiction in 1996, as (1) the FRY was not on that date a party to the Statute, and did not fulfil any of the conditions of access to the Court; (2) as the

question was one of *ordre public*, the Court should have raised it ex officio, as is apparent from the reasoning of the 2007 Judgment on the merits in the same case, as recalled in paragraph 68 of the present Judgment; and (3) the lack of "access to the Court" for a party to which that requirement applies prevents the Court from having jurisdiction.

46. We could of course say that if the Court was mistaken in 1996, it was because there were certain reasons at that time for not clearly appreciating the status of the FRY, not the least of which was the fact that the Respondent itself at that point claimed a status which it did not possess, or rather one that it was subsequently (but retrospectively) revealed not to possess.

Nonetheless, I regret that the Court refrained in the present case from adopting a solution which, besides being supported by the sound legal arguments set out above, would have enabled it to avoid depicting as erroneous one of its prior, and not least significant judgments, as it was on the *res judicata* of that decision that the Court subsequently based itself to rule on the merits and, for the first time, find that a State bore international responsibility for violating the Genocide Convention.

47. However, the path which the Court has decided to follow to justify its jurisdiction in the present case, based on the implicit (and, as will be apparent, in my view mistaken) premise that the respondent must also fulfil the conditions of "access to the Court", does not seem to me open to criticism as such. However, I consider that the Court did not follow its reasoning through to the end, and has thus opened the door to the danger of a challenge to one of the best-established principles of its jurisprudence with respect to jurisdiction. Let me explain.

48. The Respondent did not have "access to the Court" on the date when the proceedings were instituted, on 2 July 1999, as it was not on that date a party to the Statute of the Court, either as a Member of the United Nations (which it had yet to become), or in any other capacity. That is the starting-point of the reasoning, in accordance with the Judgments delivered in 2004 in the case between Serbia and Montenegro and eight NATO Members. Whatever criticisms might have been levelled at those Judgments at the time (and we know that some of those criticisms came from within the Court itself), it is legitimate for the Court, at present, not to wish to call into question a solution that was carefully considered and so recently adopted. I can only approve of the desire for continuity in the jurisprudence, which should only yield in the face of particularly cogent reasons, which the Court did not find here, rightly so in my view.

49. But the Court was then confronted with an important principle, namely that the conditions for its jurisdiction must be met on the date when the proceedings are instituted. They only *need* to exist on that date (no matter if all or some of them subsequently evaporate); they *must*, however, do so on that date — as a general rule, it is not enough for them to be satisfied at a later point, namely during the course of the proceed-

ings. This is what is very clearly explained by paragraphs 79 and 80 of the Judgment. To abide by that principle, the Court would have had to declare that it lacked jurisdiction, as the Respondent did not acquire standing to take part in proceedings ("access to the Court") until 1 November 2000, that is, after the date when proceedings were instituted.

50. However, the Court refers to a strand of its case law originating in the Judgment delivered on 30 August 1924 by the Permanent Court of International Justice in the *Mavrommatis Palestine Concessions (Judgment No. 2, 1924, P.C.I.J., Series A, No. 2)* case, which allows for greater flexibility in the application of the aforementioned principle, in the interests of realism and the sound administration of justice. This decision is thoroughly analysed in paragraphs 82 to 87 of the Judgment. In short, when the conditions governing the jurisdiction of the Court are not met, or not met in full, on the date when proceedings are instituted, but are met later, before the Court has ruled on its jurisdiction, the Court does not uphold the objection to its jurisdiction and does not dismiss the application, out of a concern for "judicial economy" — with a view to preventing "the needless proliferation of proceedings" (as indicated in paragraph 89 of the Judgment). For, dismissing an application in such circumstances would result in obliging the applicant to file a new application, to which no objection could be made as, on the date of its filing, the conditions of jurisdiction initially lacking would be met. It would be a pointless waste of time: ultimately, the Court would be obliged to hear the case on the merits anyway —the sound administration of justice dictates that it should agree to do so forthwith.

51. It is from this decision that the Court has sought inspiration in the present case, the Judgment says so explicitly. But in my opinion it did not follow its reasoning through to the end.

To be able to apply the "*Mavrommatis* doctrine", the Court should have established that Croatia could *now*, if it so wished, submit a fresh application against Serbia, identical in substance to the previous one, and which would not meet with any objection concerning the jurisdiction of the Court. It is in fact that possibility, and that possibility alone, which justifies the derogation from the fundamental principle, whereby jurisdiction is assessed on the date when the proceedings are instituted, since that derogation is aimed at dispensing with fresh proceedings, which would prolong the duration of the dispute to no real purpose.

For that, the Court would have had to conclude that, at present, not only are Croatia and Serbia both parties to the Statute of the Court — a fact as undeniable as it is undiscussed — but also that they are both bound by Article IX of the Genocide Convention, which Serbia strongly disputes.

52. But for reasons which for me remain inexplicable, the Court did not consider that it had to rule on this last point, which would have required it to take a position on the legal effects of the act of "accession" to the Convention by the FRY on 6 March 2001, accompanied by a res-

ervation designed to deny Article IX any effect with respect to that country. On the contrary, the Judgment expressly states, without, however, clearly explaining why, that "[i]t is thus not necessary for the Court to make a finding as to any legal effect of the notification of accession to the Convention by Serbia dated 6 March 2001" (Judgment, para. 96).

53. Instead of that, the Judgment confines itself to noting that Serbia became a party to the Statute of the Court on 1 November 2000, which is indisputable, and that on the same date, it was bound by Article IX of the Genocide Convention, since, according to the analysis of the Court, the FRY became a party to the Convention without reservations through succession in 1992. On 1 November 2000, then, all the conditions for the jurisdiction of the Court were met, and, according to the Judgment, were so irrevocably: there is no need to wonder whether they continue to do so at present.

54. This reasoning has two major shortcomings.

First, it is not consistent with the decision in the *Mavrommatis* case, which is only justified by a concern to avoid the fruitless institution of new proceedings which would not give rise to any objection, the conditions for the jurisdiction of the Court *now* being fulfilled. In other words, while claiming to base itself on the strand of case law deriving from the *Mavrommatis* Judgment, the Court erroneously applies it and gives it completely new scope.

What is more serious, however, is that with the reasoning adopted by the Court in this case, nothing remains of the principle — to which, however, the Judgment pays strong tribute in paragraphs 79 and 80 — according to which jurisdiction is normally assessed on the date when the proceedings are instituted. And it follows from the reasoning adopted that, for the Court to declare that it has jurisdiction, the conditions for its jurisdiction must and need only have been met *at some point following the institution of proceedings*. So much the better if they were met on the latter date; but if not, they need only have been met subsequently, in the course of proceedings, even if only briefly. In other words, the conditions for jurisdiction may not have been met at the start of the proceedings; they may no longer exist on the date when the Court rules on its jurisdiction; it will suffice that they were met at some point between those two dates. That is exactly what the Court contents itself with here: the Judgment shows that the conditions were not met on the date when the proceedings were instituted; they may no longer be met now, since the Court does not rule out the possibility that Serbia's reservation to Article IX may have had legal effect from 2001; but it is sufficient that they were met on 1 November 2000, even if they ceased to be so the following day (or a few months later).

What we have here is no longer a reasonable exception to the rule whereby jurisdiction is assessed on the date when the proceedings are instituted. It is a new rule: the previous one has been abolished. There is no point in seeking (or claiming to seek) a possible derogation from an established principle in the *Mavrommatis* decision. Having abolished the

principle, the derogation becomes pointless, even if the Court persists in asserting, mistakenly, that it falls within the continuity of its jurisprudence.

55. I think that the Court could easily have reached the same result, while following the rationale on which the "*Mavrommatis* doctrine" is based. The Court could simply have concluded that, as Serbia had been bound by the Genocide Convention from 1992 without reservations (by succession: see Judgment, paragraph 111), it could not claim to "accede" to that treaty by its notification of 12 March 2001, as no State can accede to a treaty to which it is already a party, and consequently the alleged accession was ineffective, as was the reservation to Article IX which accompanied it. Even supposing that that reservation could be regarded, at the outside, as a "belated reservation" to a treaty by which the State making the reservation had already long been bound, it could not produce any legal effect, at least in relations between Serbia and Croatia, the latter having objected to it.

It follows thus that today Croatia could, if it wished, file a fresh application against Serbia, identical in substance to the previous one, and this justifies the willingness of the Court, in application of the jurisprudence of the *Mavrommatis* decision, to overlook the fact that the conditions for its jurisdiction were not fulfilled on the date when the proceedings were instituted.

56. Of course, the above thoughts are offered only as *obiter dicta*, for I believe the Court would have been better advised to set aside Serbia's objection derived from its lack of "access to the Court" in July 1999 on the sole ground that the conditions laid down in Article 35 of the Statute are not applicable to a respondent.

That is why I had no hesitation in voting in favour of the operative clause of the Judgment.

*(Signed)* Ronny ABRAHAM.